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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/749,956	12/31/2003	Alan John Slesinski	F6180(V)	8587
201 7590 09/18/2008 UNILEVER PATENT GROUP 800 SYLVAN AVENUE AG West S. Wing ENGLEWOOD CLIFFS, NJ 07632-3100				
EXAMINER STULIL, VERA				
ART UNIT		PAPER NUMBER		
1794				
MAIL DATE		DELIVERY MODE		
09/18/2008		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/749,956

Applicant(s)

SLESINSKI ET AL.

Examiner

VERA STULII

Art Unit

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 14 July 2008.
2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-10, 12-20 and 22-25 is/are pending in the application.
4a) Of the above claim(s) _____ is/are withdrawn from consideration.
5) ☐ Claim(s) _____ is/are allowed.
6) ☒ Claim(s) 1-10, 12-20, 22-25 is/are rejected.
7) ☐ Claim(s) _____ is/are objected to.
8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/S508)
Paper No(s)/Mail Date _____
4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on July 14, 2008 has been entered.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-9, 12-14, 16-17, 19-20, 22-23 and 25 are rejected under 35 U.S.C. 102(b) as being anticipated by Bakshi et al (6,039,999). FOOD VALUES OF PORTIONS COMMONLY USED is cited as evidence as discussed below.

In regard to claims 1-3, 19 -20, 23 and 25, Bakshi et al disclose a nut spread comprising:

- a) from 30 to 75% nuts (Abstract), and
- b) added vegetable oil (Col. 3 lines 46-57),
- c) 6% and 12% of added non-peanut protein (Col. 4 lines 28-31, Col. 5 Example I, Col. 7 Example III).

In regard to claims 19, 20 and 23, Bakshi et al disclose use of high intensity sweeteners (Col. 3 lines 15-30).

Regarding total adjusted carbohydrate recitation in claims 1-3, 19-20, 23 and 25 it is noted that Bakshi et al further teaches addition of the following substances:

- high intensity sweeteners in combination with up to 45% of maltodextrin filler and avoiding use of natural sweeteners by disclosing 0% of natural sweeteners (Col. 3 lines 15-30);
- from about 15% to about 45% of polydextrose (fiber source) (Col. 3 lines 35-45, Col. 4 lines 54-55);
- up to 10% edible oil (Col. 3 lines 46-57);
- up to 30% of microcrystalline cellulose fiber AVICEL (Col. 4 lines 22-27, 56-57).

Therefore, not only Bakshi et al discloses amount of nuts, added oils and non-peanut protein as claimed, but also addition of non-nutritive fibers such as maltodextrin, polydextrose and microcrystalline cellulose, and further use of artificial sweeteners, which inherently leads to a significant reduction of total adjusted carbohydrate content. Further in this regard, it is noted that although the references do not specifically disclose every possible quantification or characteristic of its product, such as total adjusted carbohydrate content, this characteristic would have been expected to be in the claimed range absent any clear and convincing evidence and/or arguments to the contrary. The reference discloses the same starting materials and methods as instantly (both broadly and more specifically) claimed, and thus one of the ordinary skill in the art would

recognize that the total adjusted carbohydrate content, among many other characteristics of the product obtained by referenced method, would have been an inherent result of the process disclosed therein. The Patent Office does not possess the facilities to make and test the referenced method and product obtain by such method, and as reasonable reading of the teachings of the reference has been applied to establish the case of anticipation, the burden thus shifts to applicant to demonstrate otherwise.

In regard to claim 4, Bakshi et al disclose the nut spread wherein nuts comprise peanuts (Col. 2 lines 62-66).

In regard to claim 5, Bakshi et al disclose that the added vegetable oil comprises peanut oil (Col. 3 lines 53-57).

In regard to claims 6-8, Bakshi et al disclose from 30 to 75% nuts (Abstract).

In regard to claim 9, Bakshi et al disclose about 10 % of added vegetable oil (Col. 3 lines 50-52).

In regard to claim 12, Bakshi et al disclose 6% of added non-peanut protein (Col. 4 lines 28-31, Col. 5 Example I).

In regard to claim 13, Bakshi et al disclose that added protein is soy protein (Col. 4 lines 28-31).

In regard to claim 14, Bakshi et al disclose that the nut spread further comprising a high intensity sweetener (Col. 3 lines 20-21).

Claims 16 and 17 recite a total of fat content of 40% or greater and 45% or greater. Bakshi et al discloses up to 75% of peanut paste and up to 10% of added oil.

As evidenced by FOOD VALUES OF PORTIONS COMMONLY USED (p.231), 28 g of roasted peanuts contain 14.1 grams of fat, and therefore Bakshi et al discloses up to 37.8% fat from nut paste up to 10% of fat from vegetable oil, which comes out to 47.8% of fat.

In regard to claim 23, which recites that added sweetener other than sugar alcohol and fiber does not exceed 6 wt%, it is noted that Bakshi et al teaches that intensity sweeteners "are added in an amount sufficient to produce the sweetness equivalent to the addition of from about 1% to about 10% sucrose" (Col. 3 lines 27-30). It was well known in the art that high intensity sweeteners, such as aspartame or acesulfame are many times sweeter than sucrose, and therefore the amount of added aspartame or acesulfame will not exceed 6 wt%. Thus, Bakshi et al anticipates claim 23.

Claim 25 recites from 20 to 28 wt.% protein in the nut spread. It is noted that Bakshi et al discloses 6% of added non-peanut protein (Col. 5 Example I) and from 30% to 75% of peanut paste. As evidenced by FOOD VALUES OF PORTIONS COMMONLY USED (p.231), 28 g of roasted peanuts contain 6.7 grams of protein (30 wt.% protein), and therefore Bakshi et al discloses from 9% to 22.5% protein from the nut paste. Thus Bakshi et al discloses that the content of protein is from 15% to 28.5 %, and therefore anticipates claim 25.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 10, 15-18 and 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bakshi et al (6,039,999).

In regard to claims 16-17, as noted above, it appears that Bakshi et al anticipates claims 16-17 for the reasons given above. In any case, the particular amount of fat/oil one selects, is seen to have been an obvious result effective variable, routinely determinable, and based on such factors, for example, as the nutritional content of the product, desired degree of spreadability and consistency, etc. Further in this regard, applicant is referred to In re Levin, 84USPQ 232 wherein the Court stated on page 234 follows:

This Court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all

such cases, there is nothing patentable unless the applicant by a proper showing further establishes the coercion or cooperation relationship between the selected ingredients, which produces a new, unexpected and useful function. In re Benjamin D. White, 17 C.C.P.A. (Patents) 956, 39 F. 2d 974, 5 USPQ 267; in re Mason et al., 33 C.C.P.A. (Patents) 1144, 156 F. 2d 189, 70 USPQ 221.

In regard to claim 18, which recites at least 50% of fat, and claim 10, which recites amount of vegetable oil, these claims are unpatentable for the reasons given above.

In regard to claims 15 and 24, Bakshi et al do not disclose particular amounts of high intensity sweeteners. However, Bakshi et al teaches that intensity sweeteners "are added in an amount sufficient to produce the sweetness equivalent to the addition of from about 1% to about 10% sucrose" (Col. 3 lines 27-30). Bakshi et al also discloses different high intensity sweeteners such as aspartame acesulfame, saccharine, cyclamate, etc. (Col. 3lines 20-21). Therefore, it would have been obvious to one of ordinary skill in the art that the particular amounts of the conventional high intensity sweeteners will vary depending on the particular sweetener used and the level of sweetness desired.

Response to Arguments

Applicant's arguments with respect to claims 1-10, 12-20 and 22-25 have been considered but are moot in view of the new ground(s) of rejection.

Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Meade (US6,010,737) discloses nut butter composition comprising artificial sweeteners and bulking agents. Wong et al (US 5,433,970) discloses nut spread comprising artificial sweeteners and bulking agents.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to VERA STULII whose telephone number is (571)272-3221. The examiner can normally be reached on 7:00 am-3:30 pm, Monday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Steve Weinstein/
Primary Examiner, Art Unit 1794

VS